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Criminal Law—Affirmative Defenses in the Washington Criminal Code—The Impact of Mullaney v. Wilbur, 421 U.S. 684 (1975)

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CRIMINAL LAW—AFFIRMATIVE DEFENSES IN THE WASHINGTON CRIMINAL CODE—THE IMPACT OF *Mullaney v. Wilbur*, 421 U.S. 684 (1975)

A Maine jury found Stillman E. Wilbur, Jr., guilty of murder after the prosecution's proof of two elements: (1) that the homicide was unlawful, and (2) that it was intentional. Wilbur offered no evidence on his behalf to negate or otherwise refute the state's case other than his statement that he attacked the deceased in a frenzy provoked by a homosexual advance. The trial judge instructed the jury that if the prosecution established the above two elements, malice aforethought was to be conclusively inferred, unless the defendant proved by a fair preponderance of the evidence that he had acted in the heat of passion on sudden provocation. This instruction was consistent with the Maine homicide statutes[1] which made murder and manslaughter different degrees of the same offense, with the onus on the defendant to present evidence sufficient to reduce the penalty. Unsuccessful in overturning the judgment of conviction in the Supreme Judicial Court of Maine,[2] Wilbur filed a writ of habeas corpus in the United States district court.[3] That court granted the writ, and its decision was affirmed by the Court of Appeals for the First Circuit.[4] Shortly thereafter the Maine supreme judicial court decided another case contrary to the federal holdings,[5] reaffirming its view that murder and manslaughter were merely two different degrees of a single offense. The United States Supreme Court granted certiorari and remanded Wilbur's case to the court of appeals for reconsideration in accordance with the Maine supreme judicial court's construction of the state homicide statutes.[6] After the court of appeals found a denial of due process,[7] the

1. ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1975) provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." The Maine manslaughter statute, *id.* § 2551 (repealed 1975), provided in relevant part: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ."
2. State v. Wilbur, 278 A.2d 139 (Me. 1971).
3. Wilbur v. Robbins, 349 F. Supp. 149 (S.D. Me. 1972).
4. Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973).
5. State v. Lafferty, 309 A.2d 647 (Me. 1973).
6. Mullaney v. Wilbur, 414 U.S. 1139 (1974).
7. Wilbur v. Mullaney, 496 F.2d 1303 (1st Cir. 1974).

Supreme Court again granted certiorari[8] and unanimously affirmed the decision. *Held:* Once the heat of passion defense has been properly raised in a homicide case, the due process clause of the fourteenth amendment requires the state to prove beyond a reasonable doubt the absence of such defense. *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

The Court reached this decision on the basis of three factors: (1) the consequences resulting from a verdict of murder differ significantly from those resulting from a verdict of manslaughter; (2) any other decision would have allowed a state to undermine protected interests without effecting any change in the substantive law; and (3) historically, malice aforethought[9] has been the single most important factor in determining culpability for murder. Thus, when there is a significant distinction between crimes (*e.g.,* between murder and manslaughter), these considerations compel the state to prove beyond a reasonable doubt the fact upon which the distinction turns.

The Washington legislature recently enacted a revised criminal code, effective July 1, 1976,[10] which contains several presumptions

8. Mullaney v. Wilbur, 419 U.S. 823 (1974).

9. "Malice aforethought" has been defined many ways, most statutory definitions focusing on a vicious or callous disregard of the likelihood of harm resulting from an action. *See, e.g.,* Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445, 449 (1946) ("the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others"); Commonwealth v. McLaughlin, 293 Pa. 218, 142 A. 213, 215 (1928) ("wicked disregard of the consequences of his acts"). Several jurisdictions define the phrase simply as a wrongful act accomplished without any mitigating factors. *See, e.g.,* Nunez v. State, 383 P.2d 726, 729 (Wyo. 1963) ("intentional killing of a human being by another, without legal justification or excuse"). *See generally* R. PERKINS, PERKINS ON CRIMINAL LAW 766–71 (2d ed. 1969) [hereinafter cited as PERKINS]; W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 10.05, at 634–39 (7th ed. M. Barnes 1967).

In the new Washington criminal code, R.C.W. title 9A, "malice" is defined as follows:

> [A]n evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty . . . .

WASH. REV. CODE § 9A.04.110(12) (Supp. 1975).

10. WASH. REV. CODE tit. 9A (Supp. 1975). In response to concerns over an anachronistic state criminal code (WASH. REV. CODE tit. 9, which was passed in 1909), the Judiciary Committee of the Washington Legislative Council researched and prepared a revised Washington criminal code, complete with commentary, in December 1970. Judiciary Committee, Washington Legislative Council, Revised Washington Criminal Code, Dec. 3, 1970 [hereinafter cited as Judiciary Committee Proposed Code]. A history of the compilation of this code is described in Holmquist, *The Draftsman's View of the Revised Code,* 48 WASH. L. REV. 277 (1972). In developing the new statutes, this committee drew on the Model Penal Code, recently revised codes from other jurisdictions, and existing Washington statutory and case law. *See* Holmquist, *supra* at 278. The Washington legislature did not pass the new code in 1971 or 1972, and in 1973 the Washington State Association of Prosecuting Attorneys

and preponderance of the evidence (affirmative) defenses. This note will discuss the procedural effect of proof burdens and presumptions and will apply the reasoning of the Court in *Mullaney v. Wilbur* to Washington's new criminal code, contending that all but two defenses deny due process to the defendant under the *Mullaney* standard and should be changed by the Washington legislature to conform to constitutional requirements.[11]

I. RELATIONSHIP BETWEEN BURDENS, PRESUMPTIONS, AND AFFIRMATIVE DEFENSES

A. The Procedural Effects of the Burdens of Production and Persuasion and of Presumptions

Whether a criminal defendant chooses to submit a defense or to remain silent, the state must always prove beyond a reasonable doubt every fact necessary to constitute the crime.[12] A defendant's silence never proves guilt. Nonetheless, it is likely to affect a jury adversely, and a defendant is virtually compelled to offer some defense to the charges when confronted with a strong case for the state.[13] The prof-

drafted a prosecutors' version of the code. Washington State Association of Prosecuting Attorneys, Washington Criminal Code (1973 Draft). The finished bill passed by the legislature is a combination of both codes. Ch. 260, [1975] Wash. Laws 1st Ex. Sess. 817, *as amended*, ch. 9, [1975–76] Wash. Laws 2d Ex. Sess. 17.

11. Several other states will be similarly affected by the *Mullaney* holding, having provided for analogous burdens by statute or judicial decision. Included are the following: Connecticut (CONN. GEN. STAT. ANN. §§ 53a–54a (West Supp. Pamphlet 1975)); Maryland (Wilson v. State, 261 Md. 551, 276 A.2d 214 (1971); Elliott v. State, 215 Md. 152, 137 A.2d 130 (1957)); New York (N.Y. PENAL LAW § 25.00 (McKinney 1975)); North Carolina (State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971)); and West Virginia (State v. Stevenson, 147 W. Va. 211, 127 S.E.2d 638 (1962), *cert. denied*, 372 U.S. 938 (1963)). State courts have already begun to confront the problem. *See* note 48 *infra*.

12. *In re* Winship, 397 U.S. 358 (1970).

13. When presumptive language operates in a statute, it may be practically necessary for the defendant to take the stand. Commentators Ashford and Risinger illustrate why:

> [A] jury, having found A and B, and having been informed that a finding of C is correct in the eyes of the law, will quite naturally look to see if there is any reason not to find C. If there is no evidence which tends to show not-C, they will all but inevitably find C. Thus, while it is true that under the instructions the jury must decide that C has been proven beyond a reasonable doubt or else find not-C, the instructions have left no doubt in their minds that C is a correct result.

Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 YALE L.J. 165, 199 (1969) [hereinafter cited as Ashford]. Many defendants would choose not to take the stand for a variety of reasons. If the only way for the defendant to prove not-C is to take the stand where he or she would otherwise have chosen not to testify, Ashford and Risinger suggest that the cross-examination be severely limited. Ashford, *supra* at 176. *See also* note 67 *infra*.

fered defense must meet one of two burdens of proof: the burden of production, or the burden of persuasion.[14]

The burden of production is most simply defined as "producing evidence satisfactory to a judge of a particular fact in issue."[15] Under this requirement the defendant must offer evidence of any defense to be considered in the proceeding. Whether he or she has satisfactorily met the burden of production is a question of law for the court.[16] If this burden has been met, the state must negate the defense with proof

14. The division of the burden of proof into two procedural categories was first articulated in Thayer, *The Burden of Proof,* 4 HARV. L. REV. 45 (1890), and shortly thereafter in J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 353–89 (1898).

15. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. In a criminal case, the state has met its burden of production if "any reasonable inference may be drawn from the state's evidence which will support a guilty verdict," State v. Emerson, 5 Wn. App. 630, 634, 489 P.2d 1138, 1141 (1971), or if "the state produced substantial evidence tending to establish circumstances from which the jury could logically and reasonably conclude that appellant [was guilty of the crime]." State v. Pristell, 3 Wn. App. 962, 964, 478 P.2d 743, 744 (1970).

When the burden of production is on the defendant, he or she must "make out his defense . . . but it is not incumbent upon him to prove [such defense] beyond a reasonable doubt." State v. Jones, 2 Wn. App. 627, 635 n.3, 472 P.2d 402, 407 n.3 (1970).

Unlike the standard for meeting a burden of persuasion, which varies greatly depending on whether the case is civil (where the burden generally can be met with a preponderance of the evidence) or criminal (where the burden is always on the state to prove beyond a reasonable doubt), the standard for meeting the burden of production is the same in both instances. *See generally* R. MEISENHOLDER, 5 WASHINGTON PRACTICE § 551 (1965) [hereinafter cited as MEISENHOLDER]. Washington civil cases offer more specific definitions of evidence adequate to meet this burden. The burden of production has not been met if "there is no evidence at all . . . ." Kaiser v. Suburban Transp. Sys., 65 Wn. 2d 461, 463, 398 P.2d 14, 15 (1965); no substantial evidence, Trudeau v. Haubrick, 65 Wn. 2d 286, 396 P.2d 805 (1964); or "no evidence or reasonable inference therefrom," Bailey v. Carver, 51 Wn. 2d 416, 418, 319 P.2d 821, 822 (1957). A "scintilla of evidence" is not enough. Knight v. Trogdon Truck Co., 191 Wash. 646, 653, 71 P.2d 1003, 1006 (1937).

The newly adopted Washington criminal code does not articulate a specific quantum of evidence necessary to meet this burden of production; however, the judiciary committee suggested "some evidence." Judiciary Committee Proposed Code, *supra* note 10, § 9A.04.120, Comment. In practice, this is probably how the burden of production will be interpreted. *See* Cosway, *The Revised Washington Criminal Code's Vital Structure: The Burden of Proof, Felony Murder, and Justification Burdens,* 48 WASH. L. REV. 57, 67 (1972) [hereinafter cited as Cosway]. This is the same standard that is employed by the federal system. Davis v. United States, 160 U.S. 469 (1895). "Slight evidence" has been held to meet this burden, Howard v. United States, 232 F.2d 274, 276 (5th Cir. 1956); but the "merest shadow" has been found to be not enough, Battle v. United States, 209 U.S. 36, 38 (1908).

16. On a challenge to sufficiency of evidence in a criminal case, it has often been stated that the evidence must be "interpreted most strongly against the moving party and in the light most favorable to the opposing party, and whether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved." State v. Zurich, 72 Wn. 2d 31, 34, 431 P.2d 584, 587 (1967). *See generally* MEISENHOLDER, *supra* note 15, § 551.

beyond a reasonable doubt; and absent such proof, the defendant cannot be found guilty.[17] In the new Washington criminal code, use of the term "defense" indicates that the defendant has the burden of production.

In some situations, a defendant must also carry the burden of persuasion, *i.e.*, he or she is required to establish an affirmative defense,[18] typically with proof by a preponderance of the evidence.[19] If the de-

17. At least with respect to the insanity defense, in jurisdictions placing the burden of production on the defendant and the burden of persuasion on the state, courts have differed as to whether the state *must* provide evidence after the defendant has met the burden of production in order to meet the burden of persuasion. Some courts have held that it is mandatory for the state to produce some evidence in order to prove the element beyond a reasonable doubt. This generally means that the state must offer some rebuttal evidence of its own and cannot rely on cross-examination of defendant's witnesses. *See* Hartford v. United States, 362 F.2d 63 (9th Cir. 1966), *cert. denied,* 385 U.S. 883 (1966); Phillips v. United States, 311 F.2d 204 (10th Cir. 1962). Other courts, however, have upheld convictions where the government presented no rebuttal evidence on the grounds that it is within the province of the jury to determine doubt as to the defendant's sanity and that the jury is not compelled to accept uncontradicted opinion testimony of insanity. *See* State v. Schantz, 98 Ariz. 200, 403 P.2d 521, *cert. denied,* 382 U.S. 1015 (1966); State v. Joseph, 96 Conn. 637, 115 A. 85 (1921); Henton v. State, 131 Neb. 622, 269 N.W. 116 (1936).

18. The term "affirmative defense" may cause some confusion. The Judiciary Committee Proposed Code describes an affirmative defense as calling only for the burden of production, while the burden of persuasion remains on the state. Judiciary Committee Proposed Code, *supra* note 10, § 9A.04.120. The newly adopted criminal code does not use the term "affirmative defense," apparently because of concern over this potential confusion. Letter from Murray B. Guterson, Chairman of the Task Force on the Criminal Code, to Board of Governors, Washington State Bar Association, Sept. 1974, in Washington State Criminal Justice Training Commission, Revised Criminal Code Training and Seminar Manual introduction–3 (G. Golob & G. Mooney eds. 1976).

In its traditional sense, "affirmative defense" has had the effect of placing upon the defendant both burdens. This has been true both in Washington and in other jurisdictions. *See* State v. Moses, 79 Wn. 2d 104, 483 P.2d 832 (1971); State v. Putzell, 40 Wn. 2d 174, 242 P.2d 180 (1952); State v. Clark, 34 Wash. 485, 76 P. 98 (1904); W. LaFave & A. Scott, Handbook on Criminal Law § 21, at 152–53 (1972) [hereinafter cited as LaFave]. For purposes of this note, "affirmative defense" will be used in its broadest sense as giving the defendant the total burden of proof, both as to production and persuasion.

19. Most definitions of "a preponderance of the evidence" have proved more confusing than helpful, and it has been suggested that the term be used without any attempt at explanation. *See* Meisenholder, *supra* note 15, § 552, at 515.

The jury is generally instructed that "preponderance" does not necessarily relate to quantity of evidence, but should be weighed as to what evidence is most convincing. For various definitions of "preponderance of the evidence" in Washington civil cases, see *id.* § 552. At the time of this writing, proof by a preponderance of the evidence in criminal cases has been discussed in Washington only in the context of the insanity defense. *See* State v. Putzell, 40 Wn. 2d 174, 242 P.2d 180 (1952); State v. Clark, 34 Wash. 485, 76 P. 98 (1904). One form of jury instruction used in the Washington superior courts states as follows:

> In instructing you that the defendant has the burden of proving his insanity or mental irresponsibility by a preponderance of the evidence, the court does not necessarily mean that the defendant must prove his insanity or mental irresponsi-

fendant is not successful in meeting the double burden of production and persuasion, he or she will be found guilty if the state has proven the statutory elements of the crime beyond a reasonable doubt. When allowed, an affirmative defense is considered to function independently of the elements of the crime; it is seen as an additional factor of justification upon which a defendant may escape conviction.[20] In the Washington criminal code, affirmative defenses are codified as "defenses by a preponderance of the evidence."[21]

Some presumptions[22] also operate as affirmative defenses by transferring both the burden of production and the burden of persuasion to the defendant.[23] A rebuttable presumption in criminal law normally allows a fact to be inferred from the evidence presented and assists the state in proving the statutory elements of a crime.[24] In *Mullaney*, however, the state relied on a presumption of implied malice, which

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bility by the greater number of witnesses, but by the greater weight of credible evidence in the case. By preponderance of the evidence, the court does not mean the greater number of witnesses on a material point, but rather the weight of the evidence, that evidence which, when fairly and impartially considered by the jury, produces the stronger impression and has the greatest weight with you, and is more convincing as to its truth when weighed against the evidence in opposition thereto.

Criminal Jury Instructions 117 (K. Callow & W. Stuart eds. 1971).

20. *See* text accompanying notes 27–32 *infra*.

21. *See* notes 53–59 *infra*.

22. Although "presumptions" are defined in a variety of fashions (one commentator has listed at least eight meanings of the term employed by courts, *see* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196–207 (1953)), McCormick points out that a presumption is at least a "standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." MCCORMICK, *supra* note 15, § 342, at 803.

23. Professors LaFave and Scott distinguish a presumption that shifts the burden of persuasion to the defendant from an affirmative defense, in that the former concerns matters relating to a basic element of the crime, whereas in an affirmative defense, the proof is related to a collateral matter. LAFAVE, *supra* note 18, § 21, at 148. The defendant in either case, however, will be found guilty if he or she cannot prove the issue in question by a preponderance of the evidence. Analyzing the substantive effect of both statutory provisions, Ashford and Risinger conclude: "Presumptive language which operates to shift the burden of persuasion is not distinguishable on any significant ground from the creation of an affirmative defense." Ashford, *supra* note 13, at 201. The American Civil Liberties Union distinguishes clearly between presumptions and affirmative defenses, the latter being the only cases where the burden of persuasion is shifted to the defendant. Testimony of the American Civil Liberties Union Before the Senate Subcommittee on Criminal Law and Procedures 1–4, March 21, 1972 (ACLU report on the Final Report of the National Commission on Reform of Federal Criminal Laws).

24. Criminal presumptions are subject to stricter constitutional scrutiny than are civil presumptions. Justice Black, in his dissent in United States v. Gainey, 380 U.S. 63, 74 (1965), notes that this "follows from the fact that the burden of proof in a civil lawsuit is ordinarily merely a preponderance of the evidence, while in a criminal case where a man's life, liberty, or property is at stake, the prosecution must prove his guilt beyond a reasonable doubt." *Id.* at 79. As such, the majority in *Gainey* was

required the defendant to prove that he had acted in the heat of passion on sudden provocation. Similarly, in Washington the state can rely on a presumption that a defendant who was unlawfully present in a building intended to commit burglary, thereby requiring the defendant to prove noncriminal activity.[25] These "presumptions" do not simply assist the state in its factual proof, but actually shift the burden of persuasion to the defendant.

B. Varying Views on Affirmative Defenses

Determining which fact constitutes an "element" of a crime is closely intertwined with allocating proof burdens.[26] Clearly those factors specifically set out in criminal statutes are elements that must be proven by the state. Certain statutory elements, however, can be proven through circumstantial evidence with the assistance of a presumption.

Although the term "element" encompasses both kinds of facts, necessitating state's proof beyond a reasonable doubt, it is not clear that the negation of an asserted defense likewise becomes an "element" for proof purposes. Some defenses directly negate a statutory element (*e.g.*, alibi) and, as such, the state must always prove the nonexistence of the defense for an effective conviction. Other defenses operate to mitigate or excuse the behavior (*e.g.*, self-defense, entrapment) or, more generally, concern the defendant's inability to take responsibility for the criminal action (*e.g.*, insanity). Although these defenses do not technically negate statutory elements, they imply a lack of culpability

careful to point out that a criminal presumption is only a permissible inference. *Id.* at 70. The Washington court also follows this principle:

> [A statutory] presumption is not binding upon the jury [in a criminal case] even though the fact to be presumed is unrefuted by the defendant . . . . [T]he state must still sustain the burden of proving the defendant's guilt beyond a reasonable doubt. In other words, it should be made clear that the statutory presumption permits, but in no way directs, the jury to convict the accused, and must be considered by the jury in the light of the presumption of innocence which arises upon a plea of not guilty and accompanies the accused throughout the trial until overcome by evidence which convinces the jury of the accused's guilt beyond a reasonable doubt.

State v. Person, 56 Wn. 2d 283, 288, 352 P.2d 189, 192–93 (1960). The above instruction may still be subject to constitutional question. *See* note 67 *infra*.

25. WASH. REV. CODE § 9A.52.040 (Supp. 1975).

26. Although the Washington legislature adopted the Judiciary Committee Proposed Code language stating that each element must be proven beyond a reasonable doubt, it neglected to include a definition of "element of an offense." *See id.* § 9A.04.100; Judiciary Committee Proposed Code, *supra* note 10, § 9A.04.120(1).

for the action such that society will not impose criminal sanctions. But whereas it is agreed that a successful defense will relieve the defendant from liability, it is not clear who must bear the burden of persuasion. Affirmative defenses lighten the state's burden by shifting a significant amount of responsibility to the defendant, and one's view of the state's role in obtaining criminal convictions conditions one's acceptance of affirmative defenses as procedural devices.

At least one commentator has found affirmative defenses to be unconstitutional per se, arguing that whereas successfully establishing one's affirmative defense defeats or reduces culpability, the negative of such affirmative defense is necessarily a "fact" necessary to constitute the crime.[27] Under this approach, it is a semantic argument to say that the affirmative defense involves a "collateral matter" not relating to an element of the crime. If the defendant escapes culpability for his action, some implied element of criminal culpability must have been negated. Thus, the burden of proof beyond a reasonable doubt must always be on the state once a defense has been raised.

Other commentators do not consider negation of affirmative defenses a necessary element in determining guilt.[28] The defendant is regarded as guilty of the crime upon the state's proof beyond a reasonable doubt of the stated elements. Under this viewpoint the affirmative defense, provided as a matter of legislative "grace," presents only an additional factor upon which the defendant may escape culpability.[29]

The balancing test actually employed by the Court in *Mullaney* was foreshadowed by the work of Ashford and Risinger.[30] These writers subject affirmative defenses to stricter constitutional scrutiny than presumptions.[31] Such scrutiny requires that several factors be satisfied

27. *See* Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968) [hereinafter cited as Fletcher].

28. *See* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919 [hereinafter cited as Christie]. These writers extensively discuss affirmative defenses, but define them as defenses requiring only a burden of production, and not of persuasion as in the Washington statutes. The difference is very significant in terms of the defendant's ability to successfully establish a defense. Although no articles have been written justifying the shifting of both the burdens of persuasion and production, the arguments asserted by Christie and Pye would apply.

29. *See* note 111 and accompanying text *infra*, presenting the explanation given by the New York legislature concerning the burden of persuasion on the defendant in the case of felony murder.

30. Ashford, *supra* note 13.

31. Ashford, *supra* note 13, at 193. Presumptions, as defined by Ashford and Risinger, give the defendant only the burden of production and not the ultimate bur-

before requiring the defendant's proof of an affirmative defense: a higher probability of correlation between guilt and the absence of the affirmative defense than for a presumption (burden of production); a stronger state interest in terms of the difficulty in producing evidence; and a high probability that the defendant can successfully establish the affirmative defense.[32]

II. THE *MULLANEY* STANDARD FOR AFFIRMATIVE DEFENSES

The conclusions of the Court in *Mullaney* are grounded fundamentally in its prior decision in *In re Winship*.[33] In *Winship*, a 12-year-old boy was judged to be delinquent by reason of theft. The judge, employing a provision of the New York Family Court Act,[34] based his finding of delinquency on a preponderance of the evidence. In a 4–3 decision, the Supreme Court reversed, holding that the due process clause protects any accused, juvenile or adult, against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime.[35] Although a number of Supreme Court cases had implicitly recognized the constitutional imperative of the reasonable doubt standard[36] in criminal proceedings and every state had employed such a standard for adult convictions,[37] *Winship* was the first decision to expressly state that the reasonable doubt standard is a procedural safeguard of constitutional stature.

The Court found this standard to be a mandatory safeguard for the

den of persuasion. As affirmative defenses represent a greater threat to the defendant, these commentators find that the due process standard must be substantially higher. The Court in *Mullaney* agreed with this basic concept: "[T]he Due Process Clause demands more exacting standards [than for a presumption] before the State may require a defendant to bear this ultimate burden of persuasion." 421 U.S. at 703 n.31.

32. Ashford, *supra* note 13, at 186–93.

33. 397 U.S. 358 (1970). *See generally* Comment, *Proof Beyond a Reasonable Doubt in Juvenile Proceedings*, 84 HARV. L. REV. 156 (1970); Comment, *Juveniles Must Be Proven Guilty Beyond a Reasonable Doubt When Accused of Criminal Violations*, 46 NOTRE DAME LAW. 373 (1971).

34. N.Y. FAMILY COURT ACT § 744(b) (McKinney 1975).

35. 397 U.S. at 364. It is interesting that the word "fact" was used instead of the traditional word "element." Perhaps the Court did this to stress substantive considerations over traditional procedural requirements. The Court again used the word "fact" in the *Mullaney* decision. 421 U.S. at 690.

36. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525–26 (1958) (California tax exemption provision which placed burden on taxpayer to prove that he or she did not engage in criminal speech violated requirements of due process).

37. *See, e.g.*, State v. Farley, 48 Wn. 2d 11, 290 P.2d 987 (1955); MCCORMICK, *supra* note 15, § 341; 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940).

defendant, both to protect against erroneous convictions and to keep intact the defendant's presumption of innocence. It also noted that a stringent burden of proof on the state furthers respect and confidence in the criminal justice system and allows every person to be secure in the knowledge that "his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[38]

The *Winship* concerns were strongly emphasized in *Mullaney,* as the Court balanced the interests of the defendant against those of the state. Wilbur faced a far more serious penalty than had the juvenile respondent in *Winship,* yet he received less protection because he was required to affirmatively bear the burden of persuasion.[39] Wilbur's case was further assisted by the Court's finding that malice aforethought was "the single most important factor in determining the degree of culpability attaching to an unlawful homicide"[40] and that states had evidenced a clear trend in requiring the prosecution to prove this fact.[41]

The state in *Mullaney* satisfied the technical proof requirements of Maine's homicide statute[42] by showing that the killing was unlawful and intentional. Because it had proven beyond a reasonable doubt every fact necessary to constitute the crime, the state argued that *Winship* principles were inapplicable. It further maintained that the *Winship* burden of proof requirement should apply only to facts which, if not proven, would wholly exonerate the defendant. The state went on to argue that since under the Maine statute[43] Wilbur would be convicted of some degree of the crime of homicide, he had already been stigmatized and would probably lose his liberty—the fundamental in-

38. 397 U.S. at 364. Ashford, *supra* note 13, at 191–92, points out further problems with giving the defendant the burden of persuasion in this context. The criminal law should guard not only against wrongful convictions, but against the arrest and trial of innocent persons. Affirmative defenses allow for the very real possibility that large numbers of persons could be arrested for broadly defined crimes and later be found to fit under one of the affirmative defense exceptions. Further, the trial process could turn into an inquisitorial system, with the proof largely a result of the exculpatory efforts of the defendant.

39. Wilbur, upon conviction for murder, would have received a mandatory sentence of life imprisonment. In *Winship,* the defendant was faced with only a 4½-year maximum extension of sentence in a juvenile institution "benevolent" in character. 421 U.S. at 700. Further, in *Winship,* the state had retained the burden of proof by a preponderance of the evidence.

40. 421 U.S. at 696.

41. LAFAVE, *supra* note 18, § 68, at 539–40.

42. ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1975). *See* note 1 *supra.*

43. *See* note 1 *supra.*

terests which the *Winship* decision sought to protect. Both of these arguments were characterized as "formalism" by the Court.[44] It looked beyond Maine's procedural requirements to what in fact encompassed the crime of murder and found malice aforethought to be an implied element of great importance. The *Winship* decision was liberally construed and found to be concerned with any criminal sanctions directly affecting the defendant's interests, including severity of the sentence as well as guilt or innocence.

The *Winship* decision requires the state to prove every fact necessary to constitute the crime; the Court in *Mullaney* expanded this definition of "fact" beyond the stated statutory elements to any fact seriously affecting the defendant's culpability. It did so to prevent a state from masking an element of a crime in the guise of an affirmative defense, thereby undermining the interests of *Winship* without effecting a substantive change in the law.[45] If the Court had limited its analysis to consideration of technical statutory elements, states would have been left free to simply redefine their criminal statutes, characterizing certain elements as factors having to do only with punishment and thus shifting important burdens of proof to defendants. A prosecutor could charge all degrees of a crime as a single offense and leave it for the defendant to reduce the punishment accordingly by proving his or her innocence of the more serious offenses charged.[46]

44. 421 U.S. at 699. The Court quickly dismissed the state's concerns with the practical difficulties implicit in negating the affirmative defense. In light of the traditional burden upon the state in a criminal trial, the Court could not find any "unique hardship" that would warrant shifting the burden of proof to the defendant. *Id.* at 702. A "comparative convenience test" had been previously articulated by the Court with regard to presumptions: that if the defendant has ready access to evidence, it is fair to require him to come forward with such evidence where there would otherwise be a severe burden on the state. *Morrison v. California,* 291 U.S. 82 (1934). The Court did not seem to utilize any such test in *Mullaney;* the interests of the defendant were considered so fundamental that possible hardship to the state was of secondary importance.

45. 421 U.S. at 698–99.

46. The Supreme Court dealt with similar concerns in a prior case, United States v. Romano, 382 U.S. 136 (1965). Congress had created a presumption inferring possession of an illegal still from presence at a still site. Under § 5601(a)(1) of the INT. REV. CODE OF 1954, "possession, custody or control" of an illegal still authorized conviction. The Government argued that Congress' greater power to make presence a crime necessarily included the lesser power to make presence the basis of a presumption of "possession, custody or control." The Court instead found that Congress must clearly set forth all the elements of the crime and cannot rely on an inference simply to ease the state's burden of proof:

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and, with all due

Because the Court in *Mullaney* employed its balancing test in the context of the heat of passion defense, other affirmative defenses will have to be evaluated individually. The standard resulting from this decision most probably allows an affirmative defense to stand only where the legislature would impose equal criminal culpability if no such defense were available (*e.g.*, a finding of second-degree kidnapping where the defendant took his or her own child with no intent to harm) and if historically the defense has not been considered an element of the crime. This realistically includes only those situations where a liberalization of the law affords a benefit to the defendant in the form of an affirmative defense that was previously unavailable.[47] Early court interpretations of the *Mullaney* holding have tended to substantiate this view.[48]

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deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.

382 U.S. at 144 (footnotes omitted).

47. *But see* Christie, *supra* note 28. Christie and Pye point out that a preoccupation with procedural proof requirements could actually work to the detriment of the defendant by encouraging the legislature to establish stricter criminal statutes that eliminate any exculpatory or mitigating factors that the defendant might *want* to prove. They suggest that those interested in criminal procedural reform concentrate on how the process works in practice, rather than on the formal characteristics of the system.

48. The most extensive analysis of the *Mullaney* opinion to date is offered by the Maryland court of special appeals in Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975). Although the court found that *Mullaney* would not render an "innocuous statement as to burden of proof" unconstitutional, 349 A.2d at 326–27, or a presumption giving the defendant only the burden of production, it did find that *any* presumption placing upon the defendant an ultimate burden of persuasion by any standards of proof, on any issue (this encompasses *all* affirmative defenses) would hence be found unconstitutional. The court strongly encouraged a "systematic linguistic housecleaning," *id.* at 325, for the purpose of defining clearly the two elements of the burden of proof (production and persuasion) and the several meanings of presumptions. This would necessitate culling out any unconstitutional procedures, *i.e.*, any presumptions that place the burden of persuasion on the defendant and any affirmative defenses.

Two courts, considering statutory schemes similar to the Maine code provisions, have held that the state must prove "extreme emotional disturbance" when raised as a defense, in order to comply with *Mullaney*. Fuentes v. State, 349 A.2d 1 (Del. 1975); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (1975). *But see* People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 389 (1976), holding that this affirmative defense is only a "collateral matter" properly proved by the defendant. Another court has found, in light of *Mullaney*, that it is unconstitutional to place on the defendant the burden of proving self-defense to the satisfaction of the jury. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975). A New York statute which presumed a robbery weapon to be loaded and placed the burden on the defendant to prove the contrary has also been found to violate *Mullaney*. People v. Smith, 380 N.Y.S.2d 569 (Sup. Ct. 1976).

A New York court has found that *Mullaney* does not apply to the defense of entrapment. People v. Long, 83 Misc. 2d 14, 372 N.Y.S.2d 389 (1975). The entrapment defense can be distinguished, however. There the defendant admits both the *mens rea* and the *actus reus* of the criminal act, and the issue is to what degree law enforce-

III. ANALYSIS OF AFFIRMATIVE DEFENSES IN THE NEW WASHINGTON CRIMINAL CODE

The remainder of this note concerns presumptions and preponderance of the evidence (affirmative) defenses in Washington's new criminal code.[49] Three presumptions will be discussed: the inference of intent in burglary prosecutions;[50] the presumption of intent upon failure to return a vehicle pursuant to a rental or lease agreement;[51] and the presumption of knowledge from possession of stolen property.[52] Seven preponderance of the evidence defenses will also be addressed: the insanity defense;[53] and defenses relating to reckless burning,[54] compounding a crime,[55] second-degree kidnapping,[56] rendering criminal assistance,[57] felony murder,[58] and second-degree rape.[59] Upon a balancing of the interests of the state and defendant as in *Mullaney,* Washington's affirmative defenses to felony murder and to second-degree rape should be the only defenses to successfully pass court scrutiny. In all other situations, the absence of the defense appears to constitute an unstated fact that must necessarily exist before imposing the criminal sanction. Under the guidelines in *Mullaney,* this is especially true of those criminal statutes where a successful affirma-

ment officers induced him or her to commit the crime. Entrapment acts to deter reprehensible police conduct. It is used almost exclusively to uncover crimes committed against willing victims, *e.g.,* drug sales, gambling, bribery. For a contrary holding see State v. Matheson, 20 CRIM. L. RPTR. 2034 (Me. Sup. Jud. Ct., Sept. 2, 1976). *See generally* LAFAVE, *supra* note 18, § 48.

Two courts have found that *Mullaney* does not apply to the insanity defense, largely on the strength of Justice Rehnquist's concurring opinion. Rivera v. State, 351 A.2d 561 (Del. 1976); State v. Berry, 324 So. 2d 822 (La. 1975). *See* note 82 and accompanying text *infra.*

In New Jersey, mere proof of a killing does not give rise to a presumption of malice; the state must first prove an "unlawful killing" in establishing second-degree murder before malice can be implied. Unlike Maine, where malice aforethought had remained a policy presumption indicating that homicide was presumed not to have occurred in the heat of passion, "malice," as it has been interpreted in New Jersey criminal law, signifies a substantive element of intent requiring the state to prove intent to kill or inflict great bodily harm. The Court of Appeals for the Third Circuit has held that the *Mullaney* principles are not violated in these circumstances. Castro v. Regan, 525 F.2d 1157 (3d Cir. 1975).

49. WASH. REV. CODE tit. 9A (Supp. 1975). *See also id.* ch. 9.79.
50. *Id.* § 9A.52.040.
51. *Id.* § 9A.56.090.
52. *Id.* § 9A.56.140.
53. *Id.* § 9A.12.010.
54. *Id.* § 9A.48.060.
55. *Id.* § 9A.76.100(2).
56. *Id.* § 9A.40.030(2).
57. *Id.* §§ 9A.76.070(2), .080(2).
58. *Id.* §§ 9A.32.030(1)(c), .050(1)(b).
59. *Id.* § 9.79.160.

tive defense totally relieves the defendant of criminal culpability for his or her acts, or where the state relies on a presumption or on circumstantial evidence to establish the fact in issue.

A. Presumptive Devices in the New Code

Three newly enacted criminal statutes in the Washington code contain the following presumptive devices, which operate in the same procedural fashion as did the presumption of malice aforethought in *Mullaney:* the inference of intent in burglary prosecutions,[60] the presumption of intent upon failure to return a vehicle pursuant to a rental or lease agreement,[61] and the presumption of knowledge from possession of stolen property.[62] These presumptions not only assist the state in proving a necessary element, but also shift the burden of proof to the defendant to negate the element by a preponderance of the evidence.[63] Although it is permissible for the state to employ a presumption when there is a high probability that the fact in issue exists given circumstantial evidence, the *Mullaney* standard prohibits the state from further shifting the proof burden to the defendant with respect to a specific statutory element, as it has done in these three code sections.

A defendant may be inferred to have intended to commit a burglary by his or her unlawful presence in a building unless such presence is explained by evidence satisfactory to the trier of fact to be noncriminal activity.[64] "Evidence satisfactory to the trier of fact" is not de-

60. *Id.* § 9A.52.040.
61. *Id.* § 9A.56.090.
62. *Id.* § 9A.56.140.
63. Two linguistic devices are employed in these statutes that give a defendant something akin to a preponderance of the evidence proof burden. The first is "evidence satisfactory to the trier of fact." *Id.* § 9A.52.040 (presumption as to burglary). The second is "evidence raising a reasonable inference." *Id.* §§ 9A.56.090, .140 (presumption on failure to return vehicle; presumption upon possession of stolen property). For a discussion on presumptive devices in the new code, see notes 64–71 and accompanying text *infra.*
64. WASH. REV. CODE § 9A.52.040 (Supp. 1975) reads as follows:
> In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

The inference of intent to commit burglary existed in substantially the same form under the former Washington statute. Ch. 249, § 328, [1909] Wash. Laws 989 (codified at WASH. REV. CODE § 9.19.030 (1974), repealed effective July 1, 1976). Although Washington courts have held this inference to be constitutional because there is no shift in the burden of proof, they have done so on the ground that the statutory

fined in the new code. One would assume that "preponderance of the evidence" is the intended standard of proof, although it is unusual that the legislature did not clearly specify the standard here as it did in the rest of the code.[65] This lack of specificity may allow a jury to reject any evidence offered.[66] Because the jury is not given adequate guidelines for reaching a decision, this statute should be redrafted. It is necessary, however, in light of *Mullaney's* effect on such presumptive devices, that this presumption be sufficiently rebutted by the defendant's production of "some evidence," thereby leaving the state with the ultimate burden of persuasion.[67]

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language "refers to the absence of satisfactory evidence generally and not to the silence of the accused." State v. Taplin, 9 Wn. App. 545, 547, 513 P.2d 549, 550 (1973). Practically speaking, however, the defendant must offer some sort of defense meeting some burden of proof to keep the presumption from applying.

Courts have defined this inference in a variety of ways. Some courts have held that the presumption is not conclusive and that the instruction should be that the jury "*may* draw the inference . . . ." State v. Galen, 5 Wn. App. 353, 359, 487 P.2d 273, 277 (1971) (emphasis added). This interpretation of the presumptive language may not violate the *Mullaney* standard. *But see* note 67 *infra*. Other courts have held that while the presumption is not conclusive, it *does* apply unless it is explained to the satisfaction of the jury to have been made without criminal intent. State v. Durning, 71 Wn. 2d 675, 430 P.2d 546 (1967); State v. Garter, 5 Wn. App. 802, 490 P.2d 1346 (1971). A Washington court has recently held that a jury instruction deeming criminal intent from an unlawful breaking and entering of a building without allowing for explanation by the defendant unconstitutionally denies the right to a jury trial. State v. Briand, 15 Wn. App. 352, 549 P.2d 29 (1976).

65. Cosway suggests that this wording might unintentionally result in placing the burden on the state. He reasons that because the burglary section does not specifically require a preponderance of the evidence (which, under WASH. REV. CODE § 9A.52.040 (Supp. 1975), would mean that the state would have no burden to negate the defense), the statute could be construed to place the burden of persuasion on the state. Cosway, *supra* note 15, at 63 n.14. This result seems unlikely, however, given the general statutory scheme and obvious intent of the legislature.

66. Judicial construction of a similar statute in the prior Washington code offers little assistance. "Satisfactory evidence" has been defined as testimony believed by the jury. State v. Westphal, 62 Wn. 2d 301, 382 P.2d 269 (1963). A recent definition was offered in State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575, 587 (1975): "['Satisfactory evidence' means] a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. . . . [T]his evidence must satisfy or persuade the jury of the truth of the existence of these provocations . . . ." But even assuming that the jury was instructed that a fact negating any element of alleged burglary would be satisfactory, the jury would still not know what standard of proof the defendant must meet. *See* Ashford, *supra* note 13, at 204–05. For these reasons alone the legislature should redraft this statute.

67. The United States District Court for the Northern District of Georgia recently held a jury instruction presuming guilt of burglary from possession of a stolen vehicle to be a denial of due process. The court found that the charge as a whole rendered the process fundamentally unfair. Byrd v. Hopper, 402 F. Supp. 787 (N.D. Ga. 1975). The Georgia jury instruction stated that the defendant's possession of a recently stolen vehicle, "if not satisfactorily explained, consistent with his innocence, raise[s] the presumption of guilt and it would authorize you to identify the Defendant as the guilty party and to convict him of the crime as charged." *Id.* at 788. The court, finding that the charge not only shifted the burden of going forward with the

Two presumptions are even more obscurely worded. A person who does not return a rented or leased vehicle after the expiration date is presumed to have intended to defraud the owner, unless such action is explained by evidence raising a reasonable inference that there was no criminal intent.[68] Likewise, when a person possesses two or more stolen credit cards, he or she is presumed to know that they are stolen unless a reasonable inference of noncriminal intent can be shown to the trier of fact.[69] Because "reasonable inference" has not been defined in the new code, it is unclear whether the defendant may rebut these presumptions by producing "some evidence," or whether he or she has the further burden of persuasion by a preponderance of the

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evidence but had the legal effect of shifting the burden of proof, stated: "The essence of the charge is that if the defendant does not offer satisfactory proof to the jury, he is presumed guilty." *Id.* at 790.

The state court's instructions on the presumption of innocence and reasonable doubt did not cure the charge, for the entire charge could have been taken to state that "the defendant entered into the trial with a presumption of innocence but that upon proof beyond a reasonable doubt that he was in recent possession of the stolen car, he is then presumed guilty, absent satisfactory proof to the contrary." *Id.* While the problem with the jury instructions in this instance might have been attributable to ambiguity, the federal district court makes it very clear that any presumption effectively shifting the burden of persuasion to the defendant is unconstitutional. A similar conclusion was reached by the Maryland court of special appeals after an exhaustive analysis of *Mullaney*. *See* note 48 *supra*.

68. WASH. REV. CODE § 9A.56.090 (Supp. 1975) provides as follows:

> Any person to whom a motor vehicle, or piece of machinery or equipment having a fair market value in excess of one thousand five hundred dollars is delivered on a rental or lease basis under any agreement in writing providing for its return to a particular place at a particular time, who refuses or wilfully neglects to return such vehicle or piece of machinery or equipment after the expiration of a reasonable time after a notice in writing proved to have been duly mailed by registered or certified mail with return receipt requested addressed to the last known address of the person who rented or leased the motor vehicle, or piece of machinery or equipment, shall be presumed to have intended to deprive or defraud the owner thereof within the meaning of RCW 9A.56.020 defining the crime of theft. This presumption may be rebutted by evidence raising a reasonable inference that the failure to return the vehicle or piece of machinery or equipment was not with the intent to defraud or otherwise deprive the owner of his property.

69. *Id.* § 9A.56.140 reads as follows:

> (1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.
>
> (2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.
>
> (3) When a person not an issuer or agent thereof has in his possession or under his control stolen credit cards issued in the names of two or more persons, he shall be presumed to know that they are stolen. This presumption may be rebutted by evidence raising a reasonable inference that the possession of such stolen credit cards was without knowledge that they were stolen.

evidence. But since "intent to defraud" is clearly a common law element of the crime of larceny,[70] on balance both these statutes should be redrafted to specify clearly that the burden of persuasion, beyond a reasonable doubt, is on the state.[71]

B. Affirmative Defenses that Operate as Complete Defenses

The Court in *Mullaney* stressed that the *Winship* decision was concerned with any degree of stigmatization to the defendant, including severity of the sentence. Three statutes in the new code offer complete defenses which serve to absolve the defendant from any criminal liability: the affirmative defense of insanity;[72] and the affirmative defenses to reckless burning[73] and to compounding a crime.[74] In these instances, it is especially clear that some implied element is negated without which the state will not prescribe punishment.

The insanity defense in Washington assists the state by presuming each defendant is able to take responsibility for criminal actions.[75] A

70. *See* LAFAVE, *supra* note 18, § 88, at 637; PERKINS, *supra* note 9, at 265–66.

71. The above three presumptions are also subject to constitutional attack on other grounds. The Washington supreme court recently held that ch. 32, § 1, [1965] Wash. Laws 1017 (codified at WASH. REV. CODE § 9.54.140 (1974), now WASH. REV. CODE § 9A.56.090 (Supp. 1975)), establishing a rebuttable presumption of larcenous intent from failure to return leased property, was an unconstitutional violation of a defendant's due process rights. The court unanimously agreed that the fact that leased property was not returned did not establish larcenous intent beyond a reasonable doubt as required by *Winship*. State v. Alcantara, 87 Wn. 2d 393, 552 P.2d 1049 (1976). It would seem that the presumption of intent to burglarize from unlawful presence in a building and the presumption of knowledge that credit cards are stolen from mere possession of the cards could likewise be questioned on the ground that the proven fact does not establish the necessary element beyond a reasonable doubt.

72. WASH. REV. CODE § 9A.12.010 (Supp. 1975).

73. *Id.* § 9A.48.060.

74. *Id.* § 9A.76.100(2).

75. Fewer than half of the states, however, concur with this position. Courts in 26 states and the federal system hold that once sanity is raised as an issue in the trial, the prosecution must prove sanity beyond a reasonable doubt, as it must prove any other element of the crime. Under the *Mullaney* analysis, this shows a trend toward placing the burden of persuasion on the state. The latest compilation of state law concerning the burden of persuasion as to the insanity defense is found in Annot., 17 A.L.R.3d 146 (1968). For a discussion of the insanity defense in Washington, see Morris, *Criminal Insanity*, 43 WASH. L. REV. 583 (1968). *See also* Comment, *Mental Commitment and the Principle of Equivalence*, 51 WASH. L. REV. 733 (1976). *See generally* A. GOLDSTEIN, THE INSANITY DEFENSE (1967).

Courts of this persuasion closely identify sanity with intent; if sanity is doubted, then the requisite *mens rea* to find criminal guilt is in doubt, and the prosecutor must prove sanity to prove every fact necessary to constitute the crime. *See* S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 41 (1925); LAFAVE, *supra* note 18, § 40, at 313.

This approach to the insanity defense is well articulated in a recent Colorado deci-

traditional justification for shifting the burden of persuasion to the defendant has been that sanity or insanity is a fact more within the defendant's knowledge and, by its nature, easier for the defendant to prove.[76] The same could be said of malice aforethought, however, or of any other mental element that the state is presently required to prove. The prosecutor is assisted by a variety of investigative devices and receives ample notice of the defendant's intent to rely on the insanity defense because notice of reliance upon an insanity plea must be filed within ten days of arraignment.[77] Given this notice provision and state investigative power, including needed access to medical testimony, the state is probably not faced with a "unique hardship," as discussed by the Court in *Mullaney*.[78]

If a defendant is found not guilty by reason of insanity, he or she will receive treatment under Washington's recently revised criminal commitment statute,[79] which presents a more attractive prospect than a criminal penalty, which could involve anything from jail time to a death sentence.[80] As reflected in both *Winship* and *Mullaney*, criminal

sion, where the court found mental capacity to commit a crime to be a material element of a criminal action. When sanity is put into question, the court held, the state's due process clause requires the prosecution to prove sanity beyond a reasonable doubt. People *ex rel.* Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968). The same rationale was adopted by the Iowa court in State v. Thomas, 219 N.W.2d 3 (Iowa 1974). *See also* Note, 1969 WIS. L. REV. 968.

76. A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 305 (1974); Comment, *Insanity—The Burden of Proof*, 30 LA. L. REV. 117 (1969).

77. WASH. REV. CODE § 10.77.030 (1974). The defendant must file notice of an intent to rely on the insanity defense within ten days of arraignment, or at a later time if the court allows, if evidence of insanity is to be admitted at trial.

The state also has at its disposal results of police investigations, its own investigations, and use of inquiry judge subpoena power to examine all those who might have knowledge of the defendant and the crime committed. The inquiry judge provision, *id.* § 10.27.170, enacted in 1974 in response to concerns over an unwieldy and expensive grand jury system, provides for a more streamlined information collecting process as follows:

> When any public attorney, corporation counsel or city attorney has reason to suspect crime or corruption, within the jurisdiction of such attorney, and there is reason to believe that there are persons who may be able to give material testimony or provide material evidence concerning such suspected crime or corruption, such attorney may petition the judge designated as a special inquiry judge pursuant to RCW 10.27.050 for an order directed to such persons commanding them to appear at a designated time and place in said county and to then and there answer such questions concerning the suspected crime or corruption as the special inquiry judge may approve, or provide evidence as directed by the special inquiry judge.

78. 421 U.S. at 702.

79. *See generally* WASH. REV. CODE §§ 10.77.010–.930 (1974). These sections of the code provide for many long-awaited changes in the treatment of the criminally insane, including periodic examinations and conditional releases.

80. Washington voters on November 4, 1975, passed Initiative Measure No. 316 (codified at WASH. REV. CODE §§ 9A.32.045–.047, .900–.901 (Supp. 1975)), approv-

sanctions are generally conditioned on a finding of moral culpability for the act. The Judiciary Committee of the Washington Legislative Council in its report on possible code revisions suggests that the burden of persuasion be placed on the state for this reason:[81]

> [There is] no compelling reason . . . apparent why the issue of moral responsibility—an element of every criminal offense—should be treated differently in terms of burdens of proof than all the other elements of the offense which generally have the burden of proof beyond a reasonable doubt placed upon the state.

The Court in *Mullaney* stressed substantive considerations. In the future it may find sanity (if raised as an issue) to be an element requiring proof by the state beyond a reasonable doubt.[82] The Washington legislature should redraft this section, substituting the judiciary committee's recommendation assigning to the defendant the burden of production as to insanity, and to the state the burden of persuasion as to sanity.[83]

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ing a mandatory death sentence for cases of aggravated murder. A recent United States Supreme Court decision, however, has apparently invalidated the mandatory death sentence. Gregg v. Georgia, 96 S. Ct. 2909 (1976).

81. Judiciary Committee Proposed Code, *supra* note 10, § 9A.12.010, Comment at 62.

82. As Justice Rehnquist's concurring opinion indicated, the Court held in Leland v. Oregon, 343 U.S. 790 (1952), that it was *not* unconstitutional for an accused to be required to prove his sanity beyond a reasonable doubt. There have been vast changes in criminal procedure in the 23 years since *Leland,* however, and it is particularly telling that the *Winship* decision was grounded largely on Justice Frankfurter's vigorous dissent in *Leland:*

> It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."

343 U.S. at 802–03, *quoted in* 397 U.S. at 362. Frankfurter's dissent clearly reflected his belief that a finding of "guilt" necessitates sanity on the part of the defendant.

The *Leland* decision has not only been discredited by the Court's reliance on the *Leland* dissent in *Mullaney,* but by the growing trend toward moving the burden of persuasion to the state in this matter. LAFAVE, *supra* note 18, § 21, at 153. The Oregon statute found to be constitutional in *Leland* has since been repealed and there is presently no jurisdiction holding that a defendant has the burden of proof beyond a reasonable doubt for *any* defense.

The Model Penal Code gives the defendant the burden of production only as to insanity. MODEL PENAL CODE § 4.03(1) (Proposed Official Draft, 1962). The Code drafters point out: "[T]he grammatical point that the defense rests on an exception or proviso divorced from the definition of the crime is [not] potently persuasive." *Id.* § 1.13, Comment at 110 (Tent. Draft No. 4, 1955). This was precisely the situation in *Leland,* and if taken seriously, could lead to legislative redefinition of crimes that concerned the Court to such an extent in *Mullaney. But see* Rivera v. State, 351 A.2d 561 (Del. 1976), and State v. Berry, 324 So. 2d 822 (La. 1975), both holding that *Mullaney* does not affect the burden of proof on the insanity defense.

83. Judiciary Committee Proposed Code, *supra* note 10, § 9A.12.010. The Court

A person is guilty of reckless burning in the first degree if, by knowingly causing a fire or explosion, he or she recklessly damages some sort of structure or crop.[84] One is guilty of reckless burning in the second degree if he or she knowingly causes a fire or explosion and thereby recklessly places a structure or crop in danger.[85] It is a complete defense to either of these charges if the defendant can prove with a preponderance of the evidence that there was a lawful purpose for the burning, and that he or she owned the property or had permission to burn it.[86] The prior Washington statute made lack of a possessory interest a necessary element of the crime, and the Washington courts held that intent must also be considered an element and proven by the state.[87]

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did not discuss the burden of production in *Mullaney*. One commentator has argued that even a burden of production might be constitutionally impermissible, but cites no authority supporting this opinion. Cosway, *supra* note 15, at 70–71. It would be unrealistic to make the prosecution prove in *every* case the converse of all affirmative defenses. Experience shows that most people who commit crimes are sane and conscious. *See* Davis v. United States, 160 U.S. 469 (1895). Much time would be wasted and the trial system made unduly complex if the state had to prove matters upon which there was no dispute. Because the defendant in that event has a greater opportunity to know the facts, it is reasonable to place the burden of production on him or her.

84. WASH. REV. CODE § 9A.48.040 (Supp. 1975).

85. *Id.* § 9A.48.050.

86. *Id.* § 9A.48.060 provides as follows:

> In any prosecution for the crime of reckless burning in the first or second degrees, it shall be a defense if the defendant establishes by a preponderance of the evidence that:
>
> (a) No person other than the defendant had a possessory, or pecuniary interest in the damaged or endangered property, or if other persons had such an interest, all of them consented to the defendant's conduct; and
>
> (b) The defendant's sole intent was to destroy or damage the property for a lawful purpose.

87. Prior to 1963, the Washington second-degree arson statute, ch. 265, § 1, [1927] Wash. Laws 616 (codified at WASH. REV. CODE § 9.09.020 (Supp. 1961), *as amended*, WASH. REV. CODE § 9.09.020 (1974)) (now WASH. REV. CODE § 9A.48.030 (Supp. 1975)), applied to "[e]very person who, under circumstances not amounting to arson in the first degree, shall wilfully burn or set on fire any building . . . ." The Washington supreme court in State v. Spino, 61 Wn. 2d 246, 377 P.2d 868 (1963), held this statute to be an arbitrary and unreasonable exercise of police power because "[t]here is no necessity to charge and prove that the fire was harmful or was intended to be harmful." The court noted:

> Under the statute as it is worded, an indictment can be framed and a conviction obtained against one who innocently sets fire to his own property which is worthless, or which he deems worthless, for the sole purpose of disposing of it, or against one who sets any other beneficial fire, if the thing burned is the property of any person.

Id. at 250, 377 P.2d at 870. Although the statute was amended in 1963 to comport with the court's concerns by changing the wording to "wilfully and maliciously burn," ch. 11, § 2, [1963] Wash. Laws 286, Washington's new affirmative defenses present the same problem that the Washington supreme court found to be unconstitutionally overbroad in 1963. It is for the state to prove intent and nonownership of the property beyond a reasonable doubt. In the new code, the defendant must prove *both*

Although the criminal penalties for the above actions are relatively low (a gross misdemeanor and misdemeanor respectively), the defendant still faces criminal prosecution and danger of erroneous stigmatization for innocent actions. Ascertaining ownership of damaged or threatened property and the defendant's purposes in engaging in the burning should not overtax the state's investigators; therefore, insufficient state interests exist to warrant this shifting of the burden of persuasion to the defendant.

A person is guilty of compounding a crime if he agrees to confer or to accept any "pecuniary benefit" in consideration of a promise to forego the initiation of prosecution for a crime.[88] The legislature has provided a complete defense to compounding a crime if the defendant can prove by a preponderance of the evidence that the pecuniary benefit did not exceed an amount which he or she believed to be due for harm caused by the crime.[89] Historically, the state had to prove that the defendant was not accepting a payment allowed by law.[90] If the defendant raised the defense that he had reasonably believed that he was receiving money owed to him, the state had to prove the illegality of the transaction. Under *Mullaney* standards, the present statute should leave the burden of proof with the state, both for historical

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that he was sole owner of the property and that his or her *sole intent* was lawful. WASH. REV. CODE § 9A.48.060 (Supp. 1975).

The judiciary committee discussion of its proposed crime of third-degree arson (equivalent to the adopted crime of reckless burning in the first degree), Judiciary Committee Proposed Code, *supra* note 10, § 9A.48.030, Comment at 200–03, states that a person should be able to "escape criminal liability where the only interests hurt . . . are his own." Judiciary Committee Proposed Code, *supra* note 10, § 9A.48.030, Comment at 204. Under its proposal, when the defendant raised the defense of total ownership, the state would have to prove the contrary (the judiciary committee never constructed an affirmative defense of "lawful intent" such as exists in the new code). Under the judiciary committee's proposed statute for reckless burning (equivalent to the adopted reckless burning in the second degree statute), a defendant would have been guilty if he or she recklessly placed "a building of another in danger of destruction or damage." Judiciary Committee Proposed Code, *supra* note 10, § 9A.48.040. In this instance, nonownership obviously would become an element to be proven by the state if raised as a defense.

88. WASH. REV. CODE §§ 9A.76.100(1)(a)–(b) (Supp. 1975) provide:

(1) A person is guilty of compounding if:

(a) He requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that he will refrain from initiating a prosecution for a crime; or

(b) He confers, or offers or agrees to confer, any pecuniary benefit upon another pursuant to an agreement or understanding that such other person will refrain from initiating a prosecution for a crime.

89. *Id.* § 9A.76.100(2).

90. Ch. 249, § 115, [1909] Wash. Laws 923 (codified at WASH. REV. CODE § 9.69.090 (1974), repealed effective July 1, 1976).

reasons and because of the danger of erroneous stigmatization and conviction for the innocent action.[91]

C. *Affirmative Defenses that Reduce the Criminal Penalty*

Two defenses in the new code reduce the penalty for criminal action: the affirmative defense to kidnapping in the second degree,[92] and the affirmative defense to rendering criminal assistance.[93] *Mullaney* dealt directly with a defense which, if successful, merely reduced the penalty. The Court clearly held that the *Winship* considerations applied not only to the determination of guilt or innocence but also to the severity of the punishment received. Both such defenses in the Washington code appear to deny the defendant due process under the *Mullaney* standard.

In the new Washington criminal code, kidnapping in the second degree is described generally as any abduction not included within kidnapping in the first degree.[94] A defendant is not guilty of second-degree kidnapping if it is shown by a preponderance of the evidence that there was no use of, or intent to use, deadly force and that the defendant was a relative of the alleged victim, intending only to assume custody of that person.[95] This statute allows the state to intro-

91. For "compounding a crime," the judiciary committee recommended giving only the burden of production to the defendant, noting this defense was "fair and realistic and . . . in accord with common practice." Judiciary Committee Proposed Code, *supra* note 10, § 9A.76.080, Comment at 323.

The MODEL PENAL CODE § 208.32 A, Comment at 203 (Tent. Draft No. 9, 1959), further illustrates the rationality of such an exception:

> Our society does not, in general, impose penal sanctions to compel persons to inform authorities of crime. A person who refrains from reporting a crime of which he was the victim, because his loss has been made good, is no more derelict in his social duty than one who, out of indifference or friendship to the offender, fails to report a known offense. The threat of prosecution for compounding is, in any event, ineffective to promote reporting of offenses by victims who are willing to "settle" with the offender, since compounding laws can easily by evaded by accepting restitution or indemnification without explicit "agreement" to drop prosecution. Finally, compounding laws impugn the widespread practice of prosecutors, who are frequently content to drop prosecution when restitution has been made by the offender.

92. WASH. REV. CODE § 9A.40.030(2) (Supp. 1975).

93. *Id.* §§ 9A.76.070(2)(a), .080(2)(a).

94. *Id.* § 9A.40.030(1).

95. *Id.* § 9A.40.030(2). Historically, the crime of kidnapping in Washington has been applied only to nonrelatives, and as a practical matter society is not likely to assign such great moral culpability to a defendant who abducts a relative with no intent to harm. A person was guilty of kidnapping in the second degree under the prior Washington statute if he or she took a child under the age of 16 with intent to conceal the child from "his parent, parents, guardian or other lawful person . . . ." Ch.

duce a broadly defined crime and to place the burden on the defendant to reduce the charge accordingly. In all probability, such a defendant should properly be charged at the outset with custodial interference,[96] a crime involving a maximum jail term of one year, as opposed to the 10-year term for second-degree kidnapping.[97] Thus, the differences in degree of criminal culpability are great, and consequently the defendant has an appreciable interest in both the degree of his or her stigmatization and the length of a possible jail sentence. Furthermore, there is no particular hardship for the state in producing evidence negating this defense.[98] The Washington legislature should place the burden of persuasion on the state regarding the defense to kidnapping in the second degree.

A similar problem exists in the new code's defense to rendering criminal assistance in the first degree; a defendant is guilty of a class C felony[99] unless it can be proven by a preponderance of the evidence that he or she was a relative, in which case the offense is a gross misdemeanor.[100] Instructions are the same for rendering criminal assistance in the second degree, except that the penalties are a mis-

6, § 1, [1933] Wash. Laws Ex. Sess. 8 (codified at WASH. REV. CODE § 9.52.010(2) (1974), repealed effective July 1, 1976). If a parent, under this definition, was the relative who abducted the child, he or she would not be liable for the offense. Further, there have been no Washington cases holding guilty a defendant relative who abducted a child with no intent to harm. The judiciary committee felt that the defendant should have the burden of production and the state the burden of proof on this issue because of the reduced seriousness of the offense:

> [W]here the confinement or removal is by a relative . . . without the use or threat of deadly force, and where the *sole* object of the actor is to gain control of the person abducted, then sections other than kidnapping are to apply. These distinctions allow reservation of the denomination "kidnapping" for only the most serious sorts of unlawful confinement-removal cases.

Judiciary Committee Proposed Code, *supra* note 10, § 9A.40.020, Comment at 161 (emphasis in original).

96. WASH. REV. CODE § 9A.40.050(1) (Supp. 1975) states: "A person is guilty of custodial interference if, knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution."

97. *Id.* §§ 9A.20.020(b), .40.030(3).

98. Proving use of or intent to use deadly force should produce no greater difficulty for the state than should proving other elements of intent. As the Court in *Mullaney* noted, intent "may be established by adducing evidence of the factual circumstances surrounding the commission" and because intent is a fact "peculiarly within the knowledge of the defendant . . . does not . . . justify shifting the burden to him." 421 U.S. at 702. The relationship of the defendant to the victim should be ascertainable through routine investigatory measures.

99. WASH. REV. CODE § 9A.76.070(2)(b) (Supp. 1975). The sentence for a class C felony is imprisonment in a state correctional institution for a maximum term of not more than five years. A fine of not more than $5,000 may also be imposed. *Id.* § 9A.20.020(1)(c).

100. *Id.* § 9A.76.070(2)(a).

demeanor and a gross misdemeanor, respectively.[101] As with kidnapping, there is an appreciable difference in criminal penalties,[102] and evidence of a family relationship should be readily available to the state. Further, nonrelationship has always been a necessary element of the crime in Washington through specific statutory exceptions.[103] Thus, the statutory definitions of the crime appear contrary to *Mullaney*.

D. Affirmative Defenses that Meet the Mullaney *Standard*

Two affirmative defenses in the new code do not violate the due process principles that concerned the Court in *Winship* and *Mullaney:* the defenses to felony murder[104] and to second-degree rape.[105] Both defenses afford the defendant additional means to escape liability in situations where he or she would previously have been held strictly liable.

The felony murder defense is the one defense characterized by the judiciary committee as requiring the burden of persuasion with a preponderance of the evidence to be placed on the defendant.[106] It is a

101. *Id.* § 9A.76.080(2).

102. The prosecutor could charge all defendants with a criminal violation involving a possible sentence of five years in a correctional institution, *id.* § 9A.20.020(1), when it is possible that the defendant should have been charged with a lesser degree of punishment for the action (a gross misdemeanor involves at the maximum one year in the county jail), *id.* § 9A.20.020(2).

103. At common law only wives were exempt from the crime of rendering criminal assistance. LAFAVE, *supra* note 18, § 66, at 523–24. Over half the states, however, have broadened this exception. Professor LaFave feels this is justified "on the ground that it is unrealistic to expect persons to be deterred from giving aid to their close relations." *Id.* at 524. In Washington, since the enactment of the criminal code in 1909, a wide range of relatives has been expressly excluded under the wording of ch. 249, § 9, [1909] Wash. Laws 892 (codified at WASH. REV. CODE § 9.01.040 (1974), repealed effective July 1, 1976):

> Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender . . . is an accessory to the felony.

Thus, under the *Mullaney* process of historical analysis, the burden has always been upon the state to prove the nonexistence of the relationship if raised as a defense. The judiciary committee took the same stance, giving the defendant the burden of production as to a relationship, and the state the ultimate burden of persuasion. *See* Judiciary Committee Proposed Code, *supra* note 10, §§ 9A.76.040–.070.

104. WASH. REV. CODE §§ 9A.32.030(1)(c), .050(1)(b) (Supp. 1975).

105. *Id.* § 9.79.160.

106. Judiciary Committee Proposed Code, *supra* note 10, § 9A.32.020(c), Comment at 119. The judiciary committee did not discuss the offense of rape in its proposed code; however, because the same factors must be considered as for felony murder, a preponderance of the evidence defense would probably have been recommended. *See* notes 114–15 and accompanying text *infra*.

defense to felony murder in the first or second degree in the new code if the defendant can prove by a preponderance of the evidence that he or she did not commit or aid in the commission of the deadly act, was not armed with a deadly weapon, did not reasonably believe that any other participant was armed with such a weapon, and did not reasonably believe that the other participant intended to cause death or serious injury.[107]

Although many commentators have questioned the wisdom of a doctrine allowing "constructive murder" without the requisite *mens rea,*[108] the strict liability provisions of felony murder statutes have generally withstood constitutional scrutiny and are presently in force in most states.[109] In contrast to the previously discussed defenses, direct participation in the homicide has never been required to find a felon guilty of a felony murder committed by an accomplice. Thus, under historical analysis as used by the Court in *Mullaney,* the defendant's burden of proof does not concern a fact traditionally seen as an "element" of the crime.

If successfully asserted, this affirmative defense would be a complete defense. Because a substantial difference exists between possible penalties, the *Mullaney* reasoning would generally compel the burden of persuasion be placed on the state. This defense, however, indicates a tentative social recognition that one should not be strictly liable for

107. WASH. REV. CODE §§ 9A.32.030(1)(c), .050(1)(b) (Supp. 1975).

108. *See generally* Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code,* 59 KY. L.J. 788 (1971); Morris, *The Felon's Responsibility for the Lethal Acts of Others,* 105 U. PA. L. REV. 50 (1956); Note, 9 DUQUESNE L. REV. 122 (1970).

109. Although the substantive application of the felony murder doctrine varies throughout the United States, the basic principle of holding a nonkilling accomplice liable for a death occurring in the commission of a felony is in effect in all states except Ohio. *See generally* LAFAVE, *supra* note 18, § 71. Some states limit its application to "inherently dangerous felonies." *See, e.g.,* People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965). It is not applied in many states when the killing is by a victim or policeman. Commonwealth *ex rel.* Smith v. Meyers, 438 Pa. 218, 261 A.2d 550 (1970). *See also People v. Washington, supra,* 402 P.2d at 133, 44 Cal. Rptr. at 445. The limitations indicate some dissatisfaction with the doctrine, and it is possible that the doctrine may be eliminated altogether in the near future. LAFAVE, *supra* note 18, § 71, at 560–61.

The prior Washington felony murder statute was construed by the state supreme court to cover accomplices not participating in the killing. State v. Carpenter, 166 Wash. 478, 7 P.2d 573 (1932). The new code provision expressly extends liability to such accomplices and limits felony murder to the same five felonies as are listed in the former code. *See* WASH. REV. CODE § 9A.32.030 (Supp. 1975); ch. 112, § 1, [1919] Wash. Laws 273 (codified at WASH. REV. CODE § 9.48.030(3) (1974), repealed effective July 1, 1976). The language in the new code seems to imply that the killing must be by the felon or accomplice, and it is clear that a felon is not guilty of felony murder should his co-felon be killed. *See* Cosway, *supra* note 15, at 74–75.

a killing.[110] Unlike its actions with respect to other affirmative defenses, the legislature would undoubtedly omit this defense totally if all such defenses were found to be unconstitutional per se, rather than incorporate the absence of this defense into the description of the crime.[111] As discussed earlier,[112] innovations introduced in the criminal system should not be struck down without careful examination. It would seem that the Supreme Court's intent in *Mullaney* would be defeated if experimental new defenses that actually improve the defendant's position were found unconstitutional.[113]

The affirmative defenses to rape in the second degree meet the *Mullaney* standard for essentially the same reasons as does the affirmative defense to felony murder. Two different defenses are permitted: one based on a reasonable belief that the victim was not mentally incapacitated or physically helpless, and the other based on a belief that the alleged victim met the requisite age requirements.[114] Neither of these

110. Although this defense will be of limited assistance because all four elements must be proved conjunctively, it does seem to reflect an attitude expressed by the Pennsylvania court in Commonwealth *ex rel.* Smith v. Meyers, 438 Pa. 218, 261 A.2d 550, 554: "[I]t appears that juries rebel against convictions, adopting a homemade rule against fortuities, where a conviction must result in life imprisonment."

111. This is in part indicated by the legislature's cautious attitude in adopting this defense. Washington adopted this provision from the New York penal laws, the commentary of which illustrates current legislative reasoning:

> [T]he most novel change appears in the exception extending a defendant an opportunity to fight his way out of a felony murder charge . . . . This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of course, from liability for the underlying felony.

N.Y. PENAL LAW § 125.25, Practice Commentaries (McKinney 1975).

The judiciary committee noted that the burden of proof by a preponderance of the evidence must be sustained for a successful defense and further stated: "Of course, this defense to murder, if established, would not free the defendant from liability for the underlying felony." Judiciary Committee Proposed Code, *supra* note 10, § 9A.32.020, Comment at 119. Because this defense is undoubtedly regarded as a magnanimous gesture on its part, the state is unlikely to be willing to pass this stringent burden of proof on to the prosecution if forced to discard affirmative defenses.

112. *See* note 47 and accompanying text *supra*.

113. A strong proponent of the unconstitutionality of affirmative defenses per se characterizes this defense as "a political compromise," "not a stand based on principle, on a perception of just policy" and "a maneuver made for the sake of law reform." Fletcher, *supra* note 27, at 929. Although there is obviously some truth to these characterizations, the Court in *Mullaney* clearly stressed substantive considerations and practical results over procedural technicalities. With consideration of the defendant's crucial interests as articulated in the *Winship* decision, the flexible criteria set forth in *Mullaney* leave room for a practical compromise that will safeguard the defendant's interests *and* leave room for law reform introduced through affirmative defenses.

114. WASH. REV. CODE § 9.79.160 (Supp. 1975) states:

defenses was previously allowed in Washington. Rape was essentially a strict liability crime, and defendant's knowledge that the victim was either incapable of consenting or below the statutory age was not an element of the offense.[115]

As with the affirmative defense to felony murder, the legislature has given the defendant a stringent burden of proof if he or she is to be successful in asserting the defense to second-degree rape. But even though the proof burden is difficult to sustain, it does represent increased benefit to the defendant, who would previously have been held strictly liable in these situations. Because *Mullaney* is directed at safeguarding the rights of the criminal defendant, a liberalization of criminal penalties, even when accompanied with an affirmative defense burden, should not be found a denial of due process.

IV. CONCLUSION

It should be clear that allocations of burdens of proof are only superficially technical. Criminal procedure which allots substantial burdens to the defendant will, to some degree, point the trial process toward conviction. The Supreme Court in *In re Winship* held that the Constitution requires the state to prove beyond a reasonable doubt every element of the crime charged. The Court in *Mullaney v. Wilbur* considered several factors in determining whether a defense burdening the defendant affected his interests to such a degree that the defense, once raised, should have been considered an element of the crime required to be proven by the state. These criteria, when applied to Washington's affirmative defenses, suggest that most of these defenses deny due process. Only the affirmative defenses to the crimes of felony murder and rape give the defendant an additional means to escape criminal liability and thus meet the balance of interests between the

(1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: *Provided,* That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be older based upon declarations as to age by the alleged victim.

115. State v. Meyer, 37 Wn. 2d 759, 226 P.2d 204 (1951).

state and the defendant. As long as society places a greater importance on protecting the innocent than upon convicting the guilty, the state must bear the risk of nonpersuasion on any issue that seriously involves the defendant's interests.

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